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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-651

ALVIN H. BERNDT, ROBERT S. DRISCOLL and LORD, ABBETT & CO.,
Petitioners,

v.

PAULETTE PAPILSKY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Alvin H. Berndt, Robert S. Driscoll and Lord, Abbett & Co., defendants-appellants below and petitioners herein, submit this Reply Brief in support of their Petition for a Writ of Certiorari to review a judgment of the Court of Appeals for the Second Circuit dated and entered on August 1, 1972 (A30).

The opinion of the Court of Appeals for the Second Circuit (A12-A29) has now been reported at 466 F.2d 251. The citation to the report of the District Court opinion, the jurisdictional requisites, the question presented, the statute and Federal Rules of Civil Procedure involved and the statement of the case are set forth in the Petition.*

* The Petition is referred to herein as "Pet". Respondent's brief is referred to herein as "RB".

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is Not Only Erroneous But Also Conflicts in Important Ways with the Federal Rules And Principles Established by This Court And Other Federal Courts And Is Likely to Cause Substantial Waste of Judicial Effort.

The most remarkable thing about respondent's brief in opposition to our petition for certiorari is that it hardly mentions the reasons for granting the writ set forth in the petition. These may be summarized in four paragraphs as follows:

1. Where a trial judge believes that a derivative or other class action should be dismissed before trial, it is important for him to know whether it is necessary to give notice of the proposed dismissal to absent class members in order for the dismissal to bind them. If he fails to give notice, unnecessary relitigation may result if a second court later decides he should have done so. On the other hand, if he goes through the notice procedure, he may be subjecting the parties and the court to an extremely expensive, time-consuming and unnecessary process. (Pet. pp. 7-9)

2. Prior to the decision below, the law governing this question was clearly established in Rules 23(e), 23.1, 41(a) and (b) of the Federal Rules of Civil Procedure and by principles established in decisions of this Court and of the lower courts. The test was whether the dismissal was voluntary. If it was voluntary, notice was necessary. If it was involuntary, no notice was necessary. (Pet. pp. 10-16)

3. The present case involved a dismissal which was not voluntary and which, under the accepted test, should have bound the absent members. The Court of Appeals, how-

ever, erroneously adopted a new and different "more analogous" test which "carves out an exception" to Rule 41(b) and conflicts with the principles in prior decisions (Pet. pp. 10-16).

4. This ambiguous new standard will be difficult to follow and is likely to cause substantial judicial waste which the voluntary-involuntary rule avoided (Pet. pp. 7-9). It may also tend to undermine a trial court's ability to control discovery in class litigation (Pet. pp. 13-16). For these reasons this Court should grant certiorari, reverse the decision below, and thereby avoid these consequences.

Respondent's few contentions which relate to these reasons are of no significance. For example, respondent's attempt to single out derivative suits is pointless because of the complete identity between the notice provisions of Rule 23.1 governing derivative suits (A2) and those of Rule 23(e) governing class actions (A1, A2) and because of the fact that the lower courts habitually regard cases under each of the respective rules as governing notice questions under the other. An example of this interchangeability is that heretofore the voluntary-involuntary standard has prevailed both in derivative actions and in other class actions (Pet. pp. 14-15). Even respondent's brief recognizes this relationship by citing class action decisions in an effort to support the lower court's decision in this derivative action.* If the opinion below is allowed to stand, the confusing "more analogous" standard will undoubtedly be applied as widely in other class actions as in derivative actions and is likely to cause uncertainty and judicial waste in both types of cases.

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* *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971); *Laurensano* v. *Texaco, Inc.*, CCH Fed. Sec. L. Rep. ¶92,950 (S.D.N.Y. 1971); *Dolgow* v. *Anderson*, 53 F.R.D. 664 (E.D.N.Y. 1971); *Webster-Eisenlohr* v. *Kalodner*, 145 F.2d 316 (3d Cir. 1944); *Rothman* v. *Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971); and *Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481 (N.D. Ill. 1970).

Respondent attempts to justify the decision below by arguing that notice is necessary to prevent fraud. However, the notice mechanism used in derivative and class litigation is elaborate, cumbersome and expensive. It constitutes an invitation to numerous other parties to come in and complicate the litigation and is quite different from the usual practice whereby courts are available to, but do not actively seek, new litigants. The notice procedure should only be used where the likelihood of fraud is substantial, as in the case where representative plaintiffs come before the court not to litigate but to settle. On the other hand, the likelihood that fraud will escape the court's notice is small indeed where the dismissal is involuntary. Federal judges can tell whether the opposition is feigned or real and will not easily be fooled. (Pet. pp. 13-14)

Most of respondent's brief is directed to two issues which are of doubtful relevance to the notice issue: (1) the claim that White was inadequate as a class representative and (2) the claim that the res judicata effect of *White* is limited to the *White* plaintiffs. These contentions are discussed respectively in Points II and III below.

II

The Absent Shareholders Were Adequately Represented in the *White* Case.

The point most relied upon in respondent's brief is the claim that White was not a proper representative of the shareholders. This point, which was not passed upon by either of the lower courts, appears in several different forms, including contentions that White did not litigate, that she did essentially nothing to answer interrogatories, and the implication that she made no effort to obtain discovery of petitioners (RB pp. 13, 16, 7).

Contrary to respondent's implication (RB pp. 3, 7) the *White* record shows that the *White* plaintiffs actively sought discovery of petitioners. They served deposition notices and a motion for the production of documents upon petitioners early in the case. They objected vigorously to all of petitioners' interrogatories and claimed that they should not have been required to answer any of them until after they had had discovery of petitioners.

The *White* plaintiffs were successful in that the court sustained objections to some of petitioners' interrogatories. However they were unsuccessful in that they were ordered to answer the remaining interrogatories, in that petitioners were not ordered to supply documents to White until the remaining interrogatories were answered and in that the order deferred all depositions until after this exchange. Respondent does not attempt to show how she could have fared any better with respect to these matters.

Respondent's suggestion that White did not even try to supply proper answers to the remaining interrogatories (RB pp. 7, 16) is also inaccurate. White made three efforts to answer and, although the answers were held to be insufficient, this was not because of lack of volume or effort. Their insufficiency lay in the lack of specificity in the answers which revealed that even after White had obtained 1300 pages of documents from petitioners, there was no evidence supporting the claim of wrongdoing. Respondent has not even tried to show that she could have supplied better answers.

In *White* the motion to dismiss was vigorously opposed by plaintiffs (A15, A26). Respondent makes no claim that she could have done a better job in opposing that motion.

To be convincing a claim of inadequacy should be supported not only by a generalized assertion that something was done poorly but also by at least some explanation of how White could have done better. Respondent had ample

opportunity to make such a showing in the present case, or she could have attempted to reopen the *White* case on inadequacy grounds under Rule 60(b) Fed. R. Civ. P. Respondent does not deny that she attempted no such showing in either case.

Respondent's failure demonstrates that she too has no evidence of wrongdoing and confirms the fact that she could not have been any more successful as a class representative than the plaintiffs in the *White* case. This failure of respondent, who does not deny that she has the burden of proof on the inadequacy issue, demonstrates that it is a false issue.

III

The Res Judicata Effect of the *White* Decision Is Not Limited to the *White* Plaintiffs.

In arguing that the *White* judgment bars only the *White* plaintiffs (RB p. 9), respondent relies upon the district court's analysis of a derivative suit as containing two claims: (1) a claim by the corporation in which plaintiff is a stockholder and (2) a "claim" by the stockholder against his corporation for its failure to enforce the corporate claim (A9). The District Court's holding was that the *White* dismissal operated as an adjudication of the shareholder's "claim" against the corporation but not of the alleged corporate claim (A10).

In support of this contention, respondent asserts as a fact that the *White* dismissal "was based on the personal disability of White" (RB p. 4) and argues that the dismissal is analogous to a dismissal for failure to show that the plaintiff was a shareholder or for other reasons not related to the alleged corporate claim (RB p. 8).

Respondent's analysis is contrary to *Ross* v. *Bernhard*, 396 U.S. 531, 535 (1970), in which this Court stated that the two aspects of a derivative suit are the corporation's

"claim" and the plaintiff's "right" to sue on behalf of the corporation. The true nature of the relationship between the stockholder and his corporation in a derivative action was well stated by Justice Frankfurter in his oft-cited dissent in *Smith* v. *Sperling*, 354 U.S. 91, 99 (1957):

> "... the contrasting difference between a stockholder's suit for his corporation and the suit by him against it, is crucial. In the former, he has no claim of his own; he merely has a personal controversy with his corporation regarding the business wisdom or legal basis for the latter's assertion of a claim against third parties."

The policy behind Rule 41(b) to bring an end to litigation is fully applicable in derivative and other class actions. The Court of Appeals recognized that the language of the Rule literally requires that res judicata effect be given to *White* as against the alleged corporate claim (A17). It relied upon the cases referred to above and rejected the District Court's "two claims" analysis, saying that the "District Court's dismissal of the White action encompassed the corporate claim..." (A-21).

The Court of Appeals was correct in so holding because the interrogatories with which White could not cope had nothing to do with whether she was a stockholder or any similar issue. Rather they asked what petitioners were claimed to have done to harm the corporation and dealt only with the alleged corporate claim (A15). There is no basis in fact for the theory that the dismissal did not read upon that claim.

The *White* case was dismissed in two stages; it was first dismissed as against petitioners and later was dismissed as against the Fund. In an effort to bolster her "two-claim" theory, respondent asserts as a fact that the first dismissal (which pursuant to Rule 41(b) operates as an adjudication on the merits) was "not entered in favor

of the moving defendants against the Fund" and that only the second dismissal (which was without prejudice) dismissed "the Fund's claim" (RB, p. 4). These statements are flatly contrary to the *White* record. The first dismissal related to everything pending against petitioners—and the only thing pending against them was the corporate claim. The second dismissal had nothing to do with petitioners, who were no longer in the case, and was merely the routine disposition of a derivative suit which was no longer viable because the only defendant before the court was the nominal defendant (Pet. p. 4).

Nor is there any basis for the suggestion that the first dismissal was anything other than a dismissal for lack of evidence to support the alleged corporate claim. As a matter of due process this was the only ground upon which the court could have dismissed—by inferring from White's inability to answer the interrogatories that no such evidence existed (Pet. p. 9). This inference is not weakened by respondent's failure to show that she can supply better answers.

Respondent herself admits that in such cases the dismissal binds the corporation:

> "On the other hand, a derivative action may be dismissed on the merits because the corporate claim asserted by the plaintiff is not supportable. In such case, the dismissal on the merits will bar not only the stockholder plaintiff, but also the corporation and its other stockholders." (RB pp. 8-9)

Conclusion

This case presents squarely a most important question in federal judicial administration—whether notice of an involuntary pretrial dismissal going to the merits is necessary in derivative and other class actions before the

dismissal binds absent class members. This question was decided erroneously by the court below and in such a manner as to cause substantial confusion and wasted judicial effort. For the foregoing reasons certiorari should be granted.

Dated: December 7, 1972

Respectfully submitted,

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